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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 185.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

against

THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN BEHALF OF THE APPELLANT.

MAXWELL EVARTS,
Of Counsel for the Appellant.

C. B. Stevens, Nassau and Cedar Streets, N. Y.

SUPREME COURT OF THE UNITED STATES,

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Statement.

By the first section of the Act of Congress, approved July 25, 1866, and entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon" (14 U. S. Stat., 239), a

railroad company to be thereafter organized under the laws of the State of Oregon, was authorized and empowered to construct and maintain a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, Oregon, and running westerly through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of the State, where it was to connect with the line authorized by the same Act of Congress to be built by the California and Oregon Railroad Company (Appendix, p. 1).

By Section 2 of said Act of Congress, a grant of land was given to the railroad company, to be thereafter organized under the laws of the State of Oregon, which prescribed primary limits ten alternate sections in width per mile on each side of the line adopted by the company, and indemnity limits extending ten miles beyond such primary limits.

Thereafter, and on April 22, 1867, the Oregon Central Railroad Company was incorporated under and by virtue of the laws of the State of Oregon, and on October 20, 1868, the Legislature of the State of Oregon, by joint resolution, duly designated the Oregon Central Railroad Com-

pany as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred by said Act of Congress of July 25, 1866 (Record, p. 32).

The appellant in this case, the Oregon and California Railroad Company, was organized under the laws of the State of Oregon on March 7, 1870, and is the successor and assignee of the said Oregon Central Railroad Company, and is the owner of and entitled to all the benefits, privileges and grants in the State of Oregon offered and conferred by said Act of Congress of July 25, 1866 (Record, p. 34).

The map of definite location was filed on March 26, 1870 (Record, p. 36) and the line of railroad from Portland, Oregon, to Roseburg, Oregon, was constructed prior to December 4, 1872, and has since been continuously fully operated for all the purposes contemplated by and provided for in the said Act of Congress. (Record, p. 35).

The earliest acceptance by the President of the United States of this portion of the road was January 29, 1870, and the latest on March 11, 1872 (Record, p. 35). At that time the lands within the indemnity limits were insufficient to

make good the losses within the primary limits, and all the odd sections undisposed of within the primary and indemnity limits of the grant to the railroad did not come up to the quantity granted. Upon acceptance of the last section of this portion of the constructed road (March 11, 1872, if not before) it became the duty of the land officers of the United States under the requirements of Section 4 of the Act of 1866 (Appendix, p. III.) to immediately issue patents to the defendant for all the lands within the place and indemnity limits of the grant.

All of the lands involved in this suit and described in Paragraph II. of the bill of complaint herein are distant more than twenty miles from and lie within thirty miles on one side of the railroad extending from Jefferson to Roseburg, as shown on a map of definite location filed on March 26, 1870, and approved by the Secretary of the Interior on March 29, 1870 (Record, pp. 35, 36).

On August 16, 1892, the official plat of the survey of Township 27 South, Range 11 West, Willamette meridian, was filed in the United States Land Office at Roseburg, Oregon (Record, p. 36), and on the very same day the appellant the Oregon

and California Railroad Company filed with the Register and Receiver of the said Land Office at Roseburg its List No. 27, selecting the lands involved herein, and described in Paragraph II. of the bill of complaint, lying in Township 27 South, Range 11 West, as indemnity lands granted by said Act of Congress of July 25, 1866, in lieu of lands of equal area, lying within the primary limits of the grant under said Act of Congress, and otherwise disposed of by the United States prior to the passage thereof.

On October 19, 1892, the official plats of the survey of Townships 14 and 15 South, Range 8 West, Willamette meridian, were filed by the Government in the United States Land Office at Roseburg, Oregon, and on the same day the appellant the Oregon and California Railroad Company filed with the Register and Receiver of said Land Office at Roseburg its Lists No. 28 and No. 29, selecting the lands involved herein and described in Paragraph II. of the bill of complaint, lying in Townships 14 and 15 South, Range 8 West, as indemnity lands, granted by the Act of Congress of July 25, 1866, in lieu of lands of equal area, lying within the primary limits of said land grant, and otherwise

disposed of by the United States prior to the date thereof (Record, pp. 37, 38).

On October 25, 1892, more than two months after the appellant had filed its selection list of lands lying in Township 27 South, Range 11 West, one Charles Heller duly tendered the land office his filing for the benefit of all the heirs at law of one Louis Heller, as a homestead for all of the lands in Township 27 South, Range 11 West, Willamette meridian, involved in this suit (Record, p. 42), and on various dates from October 22, 1892, to December 9, 1892, other parties filed in the land office at Roseburg, in good faith, their applications to make homestead entry in their names under the homestead laws of the United States, of all the lands described in Paragraph II. of the bill of complaint and lying in Townships 14 and 15 South, Range 8 West, Willamette meridian (Record, pp. 38–41). All of these settlers, with the single exception of Louis Heller, entered upon the land long after the filing by the railroad of the map of definite location, and long after the railroad was completed and the company ready to make selection of its indemnity lands.

The selection lists filed by the Oregon and

California Railroad Company on August 16 and October 19, 1892, were presented to and approved by the Commissioner of the General Land Office, and the Secretary of the Interior, and thereafter on February 20, 1893, a patent was issued by the proper officers of the United States, conveying to the appellant the Oregon and California Railroad Company all of the lands described in the bill of complaint herein (Record, p. 42).

On October 27, 1893, the land grant under the Act of July 25, 1866, was unadjusted, and the Secretary of the Interior, regarding the patent for the land theretofore issued on February 20, 1893, to the Oregon and California Railroad Company to have been erroneously issued, directed the Commissioner of the General Land Office to demand a reconveyance of said land, as provided by statute. Such demand was thereafter duly made upon the railroad company by the Commissioner of the General Land Office for a reconveyance of said lands and the Oregon and California Railroad Company then refused and still refuses to make such conveyance (Record, p. 42).

Thereafter, and on January 31, 1896, under the authority given by the Act of Congress of March 3, 1887, entitled "An Act to Provide for the Ad-

justment of Land Grants Made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for other Purposes," a bill was filed by the government in the United States Circuit Court for the District of Oregon seeking to set aside the patent granted to the appellant on February 20, 1893, upon the ground that it was erroneously issued (Record, p. 2).

Thereafter the case was tried before the Honorable CHARLES B. BELLINGER, United States District Judge for the District of Oregon, and on June 15, 1900, a final decree was entered therein, granting the prayer of the complaint, and directing that the patent theretofore issued by the United States to the appellant, the Oregon and California Railroad Company on February 20, 1893, be set aside, canceled and held to be null and void (Record, p. 52). From the final decree of June 15, 1900, an appeal was taken by the Oregon and California Railroad Company to the United States Circuit Court of Appeals, for the Ninth Circuit, which on May 16, 1901, affirmed the judgment below upon the authority of the case of Hewitt vs. Schultz, 180 U. S., 139 (Record, p. 87).

From the final decree of the said Circuit Court of Appeals, the present appeal to this Court has been taken (Record, p. 89).

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered herein on June 15, 1900, and directing said Court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the lands in controversy issued to the Oregon and California Railroad Company February 20, 1893.

III. In not deciding that the appellant the Oregon and California Railroad Company was entitled to make the selection of the lands in controversy and to receive a patent therefor, upon the ground that the status of such lands, at the time of their selection, determined the right of the railroad thereto, and that at such time, the title of said land was in the United States, and that it was then open to selection under the grant of July 25, 1866.

IV. In not deciding that the various parties

who had come upon the land prior to the selection thereof by the appellant were mere occupants and had no claim of any kind thereto.

V. In not deciding that the relative rights of the railroad company and the individual claimants were to be determined in favor of the former for the reason that it had first filed in the local land office the record evidence of its claim to the land in controversy.

DECISION IN THE CASE OF HEWITT VS. SCHULTZ.

The Court below dismissed this suit without any opinion upon the ground that it was controlled by the case of Hewitt vs. Schultz, 180 U. S., 139. It is probable that the Government will now claim that its position in this case has been strengthened by the subsequent decisions of the Southern Pacific Railroad Co. vs. Bell, 183 U. S., 675, and of Groeck vs. Southern Pacific Railroad Co., 183 U. S., 690, which last two cases somewhat extended the doctrine of the Hewitt case.

It therefore becomes necessary to carefully examine these cases and see just what it was which was there decided. The Hewitt case was an action of ejectment, in which the plaintiff claimed

to be the owner in fee of the land by virtue of a patent issued to him by the United States. The defendants claimed title as purchasers from the Northern Pacific Railroad Company, which asserted ownership in the land by virtue of its grant under the Act of Congress of July 2, 1864. The land there in controversy was situated within the indemnity limits of the grant to the railroad company in a territory, and it appeared that Hewitt, after the plat of survey was filed, duly presented within the proper time, and on the 2d day of November, 1882, to the local land office, a declaratory statement for the land in question as required by law. On March 19, 1883, the railroad company filed in the land office a selection list embracing the land in dispute. It was held by this Court that the plaintiff Hewitt was entitled to succeed in the action of ejectment upon the ground that the land within the indemnity limits of the grant to the Northern Pacific Railroad Company was open to settlement and preemption at any time prior to its selection by the railroad company to make good losses within its indemnity limits, and that, as Hewitt had first obtained record evidence of his claim, he should have the land. Substantially the only

question considered by the Court was whether indemnity lands of a railroad grant were reserved from public settlement and not the relative rights to such lands as between a railroad company and a mere occupant. In other words, all that was decided by the Hewitt case was that the plaintiff, when he filed his declaratory statement in the local land office under the land law, acquired a right to the land because he had filed the record evidence of his claim before the railroad company filed its selection lists. The Hewitt case is the reverse of the case at bar. Here the selection by the Company is prior to the filing of the declaratory statement by the would-be settler. The Bell and Groeck cases simply held that a patent issued to a settler under the land laws prior to the selection of the land in dispute by a railroad company was valid, the Court saying in the Bell case at page 690: "We are therefore of opinion * * * that such lands [indemnity lands] remained open to homestead and preëmption entry, and that patents issued to settlers within such indemnity limits, *based upon the entries made prior to the selection by the railroad company*, approved by the Interior Department, were valid." * * * In all three

of these cases, the act of the settler in obtaining a patent, or filing a declaratory statement as required by the land law, *was prior to the selection of the lands by the railroad company.* In the present case, the selection of the lands by the railroad company is *prior to the filing of the declaratory statement by the settlers.* Not a single word in the opinions of this Court in any one of these three cases touches upon or even suggests the important questions involved in the case at bar. It is therefore difficult to see how they can have any bearing upon the present controversy. They certainly cannot be said to control the questions now before the court.

ARGUMENT.

FIRST POINT.

The appellant on August 16 and October 19, 1892, was entitled to select the land in controversy and to receive a patent therefor.

The lands involved upon this appeal are within the indemnity limits of the grant to the railroad company under the Act of July 25, 1866. The

map of definite location was filed by the appellant March 26, 1870 (Record, p. 36). The line of the railroad from Portland to Roseburg was completed and in full operation in 1872 (Record, p. 35). The losses within the place limits of the grant were then known. The entire tract within the indemnity limits was insufficient to make good the losses within the primary limits (Record, p. 23). The indemnity limits fell short some 478,487 acres of supplying the losses within the primary limits (Record, p. 86). In 1872 the railroad was ready to file its indemnity selection lists. The United States had then failed to file an official survey of the land and did not do so until twenty years thereafter. Under the rulings of the Interior Department the railroad was not permitted to present its selection lists until the official survey had been filed in the local land office, and upon the very day such official survey was filed, the railroad company, after being compelled by the United States to wait twenty years, filed its selection lists covering the land in controversy.

The single but important question presented in this case is whether the railroad lost its right to make the selection when it did, because, before

such selection and subsequent to the time when the company was ready to make its selection, but was prevented by the government's delay in filing its official survey, the land was occupied and nothing more by various individuals. In other words the question comes to this: What was the status of the lands when selected by the railroad company? Were they then public lands of the United States, and was the railroad prevented from making a selection thereof by reason of their mere occupancy?

It is well established law that the mere occupancy of public land creates no right therein as against the United States, and that the land still remains part of the public domain and subject to disposal by the government.

In the Yosemite Valley Case, 15 Wall., 77, it was so held, Mr. Justice FIELD stating the rule, as follows:

> "A party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party." (Syllabus).

In the case of Lansdale vs. Daniels, 100 U. S., 113, 116, it was said:

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose."

In the case of Sparks vs. Pierce, 115 U. S., 408, 412, it was said by Mr. Justice FIELD as follows:

> "The case presented, therefore, is that of occupants of the public lands without title, and without any attempt having been made by them, or by any one representing them, to secure that title, resisting the enforcement of the patent of the United States, on the ground of such occupation. *Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them.*"

The right of a railroad company to select lands within the indemnity limits of its grant to make good losses within the primary limits is an inchoate right created by the granting act, and capable of perfection only by the selection of the indemnity lands. At the moment of selection

the right is perfected. Such selection cannot, however, be made until the official plat of the survey is filed by the government in the land office.

The right acquired by an occupant of the public lands of the United States is merely an inchoate right to be perfected by filing the declaratory statement or homestead entry and carrying out the further provisions of the land laws. The utmost which this inchoate right gives to the occupant is simply a preference as against other individuals who have not an equal or prior equity in and to the land so occupied, so that as between individuals the question is which one first occupied the land. This rule has no application where the claimants to land are a railroad under its land grant and an individual. In such a case their relative rights are determined, and determined only, by the question of which one first filed record evidence of a claim (Tarpey vs. Madsen, 178 U. S., 215). This inchoate right of the individual cannot be perfected until after the filing in the proper land office of the official plat of the survey of the land.

When, therefore, the official plat of the survey of the land in controversy was filed, all that

either the railroad or the individuals had was an inchoate right to the land in dispute and the opportunity for the first time to perfect such right. In the case of the railroad company its inchoate right was acquired (except in one instance) many years prior to the creation of any inchoate right in the occupants of these lands.

Thereupon and on the very day the official survey was filed, the railroad company filed its selection lists and perfected its inchoate right to the land. At the time of its selection by the railroad the land was under the decisions heretofore cited public land of the United States and subject to its disposal. The ordinary rule is that the right of a railroad to select indemnity lands is determined by the status of the lands at the time of selection unaffected by their past history and certainly (it is confidently submitted) unaffected by what claims thereto may be made in the future. It would seem, therefore, that the question presented is whether the ordinary and well-established rule regarding the selection of indemnity lands shall prevail, or whether the land in question, while remaining at the time of selection part of the public domain, so far as the government is concerned, is to be considered

as withdrawn from the public domain as regards the railroad, because of its mere occupancy by an individual without the filing in the land office of any record evidence of his claim. In short, is the land in dispute to be considered public land for one purpose and not for another?

We now come to the consideration of the decisions of this court holding that the fact and date of occupancy are unimportant in determining conflicting claims of an individual and a railroad company to lands within a railroad grant. The latest and most important of these is Tarpey vs. Madsen, 178 U. S., 215.

In the Tarpey case it was held that the relative rights of a railroad and an individual must be determined, not by the act of the company in fixing definitely the line of its road and not by the mere occupancy of the individual, but by the record evidence in the case; on the one hand, by the filing of the map of definite location in the office of the Secretary of the Interior, and on the other, by the filing of the declaration of entry of the individual in the local land office. The land involved in the Tarpey case was within the place limits of the grant to the railroad com-

pany. If the claims as between the railroad and the occupant were there determined by ascertaining which first filed record evidence of its right, it would seem as if the same rule must have application in the present suit when the land is within the indemnity limits. The only difference is that the right and title of a railroad to land within the place limits of its grant is determined by the filing of a map of definite location, while the right and title to the land within the indemnity limits of a grant to a railroad company is determined by the filing in the land office of its selection lists. If, in the first case, the occupant has no claim to the land, because the map of definite location was filed by the railroad in the land office before the occupant filed his declaration of entry, then it would seem to follow that the occupant has no right to land lying within the indemnity limits of the grant to the railroad company, if, prior to the filing by him of his declaration in the local land office, the railroad company had filed its selection list covering the land. The right and title of the railroad to the land was determined in the Tarpey case by filing the map of definite location. In the present case, by filing the selection lists, and it is

not easy to perceive what principle or distinction can be drawn between the two cases.

In the course of his opinion in the Tarpey case, Mr. Justice BREWER said, at page 222:

> "Any controversy between two occupants of a tract open to preëmption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy may be decisive of the controversy between such individual applicants for a tract of public land, *but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record.*"

And again at page 228, it was said:

> "Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the

> company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office."

In the case of Northern Pacific Railroad vs. Colburn, 164 U.S., 383, the railroad company filed its map of definite location July 6, 1882. At that time the land in dispute which was within the place limits of the grant was occupied and cultivated by a settler, but no filing or entry therefor had been made in the land office. The State Court of Montana decided that the mere occupancy of the land, prior to the filing by the railroad of its map of definite location, excepted the land from the scope of the company's grant. This Court upon writ of error reversed the judgment below and Mr. Justice BREWER, at page 386, said:

> "It is true it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties.

> And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. *But frequent decisions of this court have been to the effect that no preëmption or homestead claim attaches to a tract until an entry in the local land office.*"

In Whitney vs. Taylor, 158 U. S., 85, this Court said, at page 94:

> "But it is also true that settlement alone without a declaratory statement creates no preëmption right. * * * *And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preëmption claim.*"

In Buxton vs. Traver, 130 U. S., 232, it was held that:

> "A settler upon public land, in advance of the public surveys, acquires no estate in the land which he can devise by will, or

which, in case of his death intestate, will pass to his heirs at law, until, within the specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law" (Head note).

As we read the foregoing cases they would seem to control the case at bar and to place beyond controversy the proposition that the individual occupants of the lands in question acquired no rights thereto by their mere occupancy as against the record claim of the railroad company evidenced by the filing of its selection lists. Counsel for the goverment, however, may contend that the cases cited have no application in the present suit for the reason that the land there involved fell within the place limits of the railroad grant, while here the lands are within the indemnity limits. It is true that this distinction can be drawn between the cases cited and the case at bar, but the force of the distinction is not obvious.

If it is conceded that the title of a railroad to its place lands under a government grant is deter-

mined by the filing of its map of definite location and that the unascertained and floating right to its indemnity lands becomes fixed by filing in the land office its selection lists (we assume that this will be conceded by counsel for the government), and if the occupancy of an individual prior to the acquisition by a railroad of title to its place lands by the filing in the land office of its map of definite location does not withdraw the land from the operation of the railroad grant or affect in any way the claim of the railroad, then it is certainly not clear why such occupancy prior to the acquisition by a railroad of title to its indemnity lands by the filing of its selection lists in the land office should have a different effect and should withdraw the land from the operation of the railroad grant, especially when the acreage of such indemnity lands is insufficient to make good the losses within the primary limits. It would seem as if the result of the occupancy must be the same in each case. If in the case of place lands, prior occupancy is unimportant in determining the relative rights of railroad and individual, and the conflicting claims are settled by the record evidence in the land office and by that alone, it is

not at all plain why the same reasoning should not result in applying the same rule as between the conflicting claims of a railroad and of an individual to land within the indemnity limits of a government grant.

When it is borne in mind that in the case at bar the inchoate right of the railroad was prior in point of time to the inchoate right of the occupant, and that such inchoate right of the railroad was perfected prior to any attempt to perfect the right of the occupant, and when it is further considered that all the lands within the indemnity limits are not sufficient to make good the losses within the primary limits, and that if it had not been for the delay of the government in making a survey of the land, the inchoate right of the railroad would have been perfected prior even to the inception of the inchoate right of the occupant, it is difficult to see upon what principle the Courts below have decided that the railroad company was not entitled to the patent which it had obtained from the government for the land in question.

It certainly could never have been intended by Congress that this grant of indemnity limits to the railroad company should be defeated—first,

by delay on the part of the government in completing a survey of the lands; and, second, by permitting any mere occupant to insist that, by reason of such occupancy alone, the railroad had lost the opportunity to perfect the right given to it long prior to the commencement of such occupancy. It certainly never occurred to this Court in the case of Hewitt vs. Schultz, or the subsequent cases of Bell and Groeck, that the doctrine there decided called for a decree annulling the patents granted by the government in the present case. On the contrary, these cases were decided upon the very ground which it is sought to apply in the suit at bar, viz: that the declaratory statement and the patents of the individuals were prior in point of time to the selection of the lands by the railroad company, or to put it in another way, that the individuals obtained record evidence of their claim before the railroad did. These cases simply emphasize and repeat the principle of Tarpey vs. Madsen (*supra*), and apply to indemnity lands, the doctrine that the relative rights of a railroad and an individual should be determined by the record evidence, and that if the occupant had filed his declaration in

the local land office prior to the filing by the railroad of its selection list, then his right was superior to that of the railroad. In the case at bar, however, it was the railroad which first filed its selection list, thus first perfecting an inchoate right first obtained, and not only under the doctrine of Tarpey vs. Madsen, but under the ordinary principles of equity the right of the railroad to the patent for this land being first in point of time, whether as to its record title or as to its original inception, should be held to be superior to the right thereto of the individual occupants. In other words, the maxim should apply "*qui prior est in tempore potior est in jure.*"

In the case of Shepley vs. Cowan, 91 U. S., 330, the plaintiffs asserted title to the premises in question under a patent issued by the Governor of the State of Missouri, on February 27, 1850, purporting to be for lands selected under the Eighth Section of the Act of Congress of September 4, 1841. The defendants claimed title to the premises under a patent of the United States, dated July 21, 1866, issued to the heirs of Thomas Chartrand upon an alleged pre-emption right acquired by a settlement of their ancestor. It appeared that Chartrand, the ancestor of the

defendants, settled upon the land in 1835 and made application to prove his settlement and entered the land under the laws then existing. The local land officers declined to receive his proofs upon the ground that the land was then reserved. This was a mistake. The State of Missouri from which the plaintiffs obtained their title selected the land subsequently in 1849. The plaintiffs were successful in the Court below, but upon appeal to this Court, the case was reversed upon the ground that the right in the ancestor of the defendants was first in point of time, and that the first initiatory step was taken by such ancestor to perfect that right, and it was held by the Court, that

> "Where a State seeks to select lands as a part of the grant to it by the eighth section of the act of Congress of Sept. 4, 1841, and a settler seeks to acquire a right of pre-emption to the same lands, *the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act, and cuts off all intervening claimants.*
>
> "The eighth section of the act of Sept. 4, 1841, in authorizing the State to make

selections of land, does not interfere with the operation of the other provisions of that act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States are not in conflict with each other. *Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had.*

"Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. *In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.*"

In the case of United States vs. Missouri, &c., Railway, 141 U. S., 358, Mr. Justice HARLAN in writing the opinion of the court seems to acquiesce in the view that as between an occupant of the public lands and a railroad claiming indem-

nity lands under a grant from the government that one is to be preferred who first obtains record evidence of his claim, for it is said, at page 376:

> "In respect, therefore, of even numbered sections within the indemnity limits of the Leavenworth road, preëmption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri-Kansas Company. And rights thus attaching would not be displaced by subsequent selection, and by issuing patents to the railroad company."

When Mr. Justice HARLAN spoke of the settler's "rights thus attached," he meant, of course, attached by the commencement of some proceeding in the proper land office. Such was the meaning given to the word by Mr. Justice MILLER in Kansas-Pacific Railway Company vs. Dunmeyer, 113 U. S., 629, when he said, at page 644:

> "Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate

right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds."

In other words, this Court, in the Missouri Railway Case virtually held that the settlers were entitled to their land in preference to the railway company under its grant, because record evidence of their claim was first filed in the land office and the logical deduction from this conclusion is, that if the railway company had first recorded the evidence of its claim by filing its selection list in the land office, it would have acquired a right to the land to be preferred to the claim of the mere occupant thereof. That is to say, this decision is but in accord with the accepted doctrine of this Court as last declared in the Tarpey Case, to the effect that, while the rights of individual claimants are to be determined by the question of which first occupied the land, yet, as between

a railroad and an individual, their relative rights are to be decided and decided only by the fact of which one took the first initiatory step and filed record evidence in the land office of a claim to the land.

The relative rights of two railroads claiming the same land, within the indemity limits of their respective grants, are determined by which has first acquired the record evidence of its claim. As was said by Mr. Justice MILLER in St. Paul Railroad vs. Winona Railroad, 112 U. S., 720, 732:

> "Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land. *In this case, and for these reasons, priority of selection secures priority of right.*"

We restate the important facts in this case as follows:

FIRST. That the railroad filed its map of definite location March 26, 1902, and that its

line of road from Portland to Roseburg was completed and in full operation in 1872, and the company then ready to select its indemnity lands, but was unable to do so until 1892 because of the delay of the government in filing its official survey.

SECOND. That the land in dispute (with the exception of one tract) was not occupied by settlers until long after 1872, when the railroad was ready to make selection thereof, but was prevented by the failure of the United States to file its official survey.

THIRD. That all the lands within the indemnity limits of the grant to the appellant were insufficient to make good the losses within the place limits.

FOURTH. That at the time the railroad filed its selection lists the land was public land of the United States unaffected by any record claims thereto of any individual.

We also restate the important principles established by the decisions of this Court, as follows:

FIRST. That the status of land at the time of its selection determines the right of the railroad thereto.

SECOND. That the relative rights of a rail-

road and an individual to lands within the indemnity limits of a railroad land grant are determined by ascertaining which took the first initiatory step and filed in the land office record evidence of a claim thereto.

We respectfully submit that the application of the well-settled principles of land-grant law stated in the two preceding paragraphs to the facts in this case gives to the railroad a clear equitable right to the lands in dispute and to the patents of the government issued therefor.

SECOND POINT.

The indemnity lands were appropriated to the grant under the act of 1866 at the time the map of definite location was filed in March, 1870, and the road was built and accepted in 1872 and selection was not necessary in order to fix and determine the rights of the railroad thereto.

By the fifth section of the act of 1866 (Appendix, p. IV), it is provided that the appellant,

> " shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops

of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

The land grant to the railroad was made in consideration of this provision and the government virtually agreed that, if the railroad would build its line of road through an uninhabited country, and would carry the property and troops of the United States free of charge for all time to come, it would grant to it ten alternate sections of land for each mile of its road.

On March 11, 1872, the time of the acceptance by the President of the United States of the last section of the portion of the road running through the lands in dispute, the lands within the indemnity limits of the grant were insufficient to make good the losses within the place limits, and all the land, both in the indemnity and place limits, was not equal to the amount of ten sections per mile offered by the government in return for the building of the road and the carrying of the property and troops of the United States free of charge.

The position of the appellant, therefore, is that the railroad was entitled on March 11, 1872, to patents for all the lands along that part of its road which had been accepted and was then being operated whether the same were within the indemnity limits or the place limits of the grant, and its right to the indemnity lands was determined and fixed under the circumstances of this particular case, and the provisions of the act of July 25, 1866, by the filing of its map of definite location and the acceptance of its road by the government, and did not require any selection by it of its indemnity lands.

There was no need or necessity or opportunity to make selection for the reason that the railroad was entitled to all of its indemnity lands, and the railroad would not be required to do what would be vain and unnecessary. That indemnity lands are appropriated to the grant without selection, when they are insufficient to supply the deficiencies in the place limits, was held by this Court in St. Paul & Pacific vs. Northern Pacific, 139 U. S. 1, 19, where it was said:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to

> make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, *for they were all appropriated.*"

Even if selection of its indemnity land had been necessary, the railroad was ready to make such selection at the time of the filing of its map of definite location long before the land was occupied by settlers, but was not permitted by the government to make such selection until the government filed its survey of the land. The failure to select the indemnity land in 1872, was not the fault of the railroad, but the fault of the United States, which now seeks to set aside the patent. Surely a complainant in a suit in equity cannot avail itself of its own neglect and laches to defeat the just rights of its own grantee.

We, therefore, respectfully submit that in 1872 at the latest, when the railroad was accepted by the government, its indemnity lands were appropriated to the grant, and the railroad then became

immediately entitled to a patent therefor under the provisions of Section 4 of the Act of 1866 (Appendix, p. iv), and the right of the railroad to said lands could not be affected by any subsequent occupancy of the lands by settlers.

THIRD POINT.

The United States cannot maintain the present suit.

The patent in this case was not obtained by fraud. The government therefore has no interest in the matter and cannot bring a suit in equity to cancel the patent, but must leave the parties interested, viz., the railroad company and the settlers, who claim that they are equitably entitled to the land in question, to settle the matter between themselves. In the case of United States vs. Beebe, 127 U. S. 338, in which this question was discussed, it was said at page 342 as follows:

> "If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested."

In the case of United States vs. San Jacinto Tin Co., 125 U. S. 273, it was held as follows:

> "When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the government has no interest in the matter, the suit must fail" (Headnote).

As it seems to us the only question in the present case is between the railroad and individuals which should be settled in a litigation between themselves and that the government has no interest in the matter. We, therefore, respectfully submit that the bill should be dismissed upon the ground that the United States cannot bring suit to cancel this patent for the reason that the outcome of the suit would simply be to benefit one of two claimants to the land and would not subserve any interest of the government.

FOURTH POINT.

The judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

MAXWELL EVARTS,
Of Counsel for Appellant.

APPENDIX.

ACT OF CONGRESS APPROVED JULY 25, 1866 (14 U. S. STAT., 239).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the "California and Oregon Railroad Company," organized under an act of the State of California, to protect certain parties in and to a railroad survey, "to connect Portland, in Oregon, with Marysville, in California," approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence Northerly, through the Sacramento and Shasta Valleys, to the Northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the Southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first named company: *Provided*, That the

company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

SEC. 2. *And be* [*it*] *further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States,

respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided, also*, That, settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turntables, water stations, or any other structures required in the construction and operating of said road.

SEC. 4. *And be it further enacted*, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that

twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissoners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

SEC. 5. *And be it further enacted*, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

SEC. 6. *And be it further enacted*, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of

said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

SEC. 7. *And be it further enacted*, That the said companies named in this act are hereby required to operate and use the portion or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any State, of competent jurisdiction.

SEC. 8. *And be it further enacted*, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

SEC. 9. *And be it further enacted*, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by the provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Whereever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors, and assigns," the same as if the words had been inserted, or thereto annexed.

SEC. 10. *And be it further enacted*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies: *Provided*, That the term "mineral lands" shall not include lands containing coal and iron.

SEC. 11. *And be it further enacted*, That the said companies named in this act shall obtain the consent of the legislatures of their respective states, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

SEC. 12. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.